STATE OF WISCONSIN
IN SUPREME COURT

No. 03-0106-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

SCOTT R. JENSEN,
STEVEN M. FOTI and
SHERRY L. SCHULTZ,

Defendants-Appellants-Petitioners.

ON PETITION FOR REVIEW FROM A DECISION OF THE WISCONSIN COURT OF APPEALS, DISTRICT IV, AFFIRMING A PRETRIAL ORDER DENYING PETITIONERS' MOTION TO DISMISS THE CRIMINAL COMPLAINT, ENTERED IN THE CIRCUIT COURT FOR DANE COUNTY, THE HONORABLE DANIEL R. MOESER, PRESIDING

BRIEF AND APPENDIX OF PLAINTIFF-RESPONDENT

PEGGY A. LAUTENSCHLAGER
Attorney General

BARBARA L. OSWALD
Assistant Attorney General
State Bar No. 1021541

Attorneys for Plaintiff-Respondent

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 266-3067

TABLE OF CONTENTS

Page

Page

CASES CITED

Page

Page

Page

Page

Page

Page

STATUTES CITED

Page

OTHER AUTHORITIES

Page

STATE OF WISCONSIN

IN SUPREME COURT

No. 03-0106-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

SCOTT R. JENSEN,
STEVEN M. FOTI and
SHERRY L. SCHULTZ,

Defendants-Appellants-Petitioners.

ON PETITION FOR REVIEW FROM A DECISION OF THE WISCONSIN COURT OF APPEALS, DISTRICT IV, AFFIRMING A PRETRIAL ORDER DENYING PETITIONERS' MOTION TO DISMISS THE CRIMINAL COMPLAINT, ENTERED IN THE CIRCUIT COURT FOR DANE COUNTY, THE HONORABLE DANIEL R. MOESER, PRESIDING

BRIEF AND APPENDIX OF PLAINTIFF-RESPONDENT

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Publication is warranted. The state does not oppose petitioners' request for oral argument.

INTRODUCTION

Petitioners Scott R. Jensen, Steven M. Foti and Sherry L. Schultz are charged with misconduct in public office for using state resources for private campaign activity. According to the criminal complaint, Jensen and Foti, state legislators, hired Schultz into a well-compensated state job, which they supervised, for the exclusive purpose of helping to run private political campaigns. Jensen also supervised state employees, Jason Kratochwill and Ray Carey, for this purpose as well as other state employees to work on Taxpayers for Jensen. In the words of the trial court, petitioners "worked together and conspired to use state money, state time, state resources to basically orchestrate the continuation of their existence and, in some situations, to elect or reelect others who were similarly situated with respect to their views." (42:84).

Petitioners assert that Wis. Stat. § 946.12(3) is unconstitutionally vague as applied, overbroad and interferes with the separation of powers. All of their arguments are legally and logically infirm and must be rejected.

ARGUMENT

I. PETITIONERS LACK STANDING TO CHALLENGE WIS. STAT. § 946.12(3) ON GROUNDS OF VAGUENESS.

Petitioners first assert that § 946.12(3) is unconstitutionally vague as applied to the conduct alleged in the complaint. They are without standing to raise this issue. In *State v. Tronca*, 84 Wis.2d 68, 267 N.W.2d 216 (1978), this court held that defendants who were actually aware of the criminality of their actions, as petitioners were here, did not have standing to challenge the official misconduct statute on grounds of vagueness. In reaching its conclusion, the court looked at defendants' attempts to cover up their unlawful behavior and evidence that they knew what they were doing was illegal, finding the

evidence demonstrated that "[e]ach of the defendants was well aware that he was approaching the area proscribed by the statute." *Id*. at 87.

Tronca is squarely on point. The criminal complaint provides clear factual allegations that petitioners knew that the conduct with which they are charged is unlawful. According to the complaint, Assembly members and staff were specifically notified that using state employees and resources for campaign work was prohibited (1:5-6; R-Ap. 105-106).[1]

Further, in direct contrast with his position on appeal, Jensen told investigators that state employees should not raise or discuss raising campaign money at all on state time (1:23; R-Ap. 123). He also said that his actions would have made clear that all work for the Republican Assembly Campaign Committee needed to be done off of state time (1:33; R-Ap. 133). Likewise, Jensen told an employee in the Jensen Capitol office in November 1997 that it was illegal to do campaign work on state time or using state property (1:37-38; R-Ap. 137-138).

Jensen's false statements to investigators demonstrate his awareness that his actions were illegal. For example, Jensen said that during the time Schultz worked for Foti, Jensen did not know what Schultz's duties were (1:23; R-Ap. 123). However, the criminal complaint alleges that Jensen not only knew what Schultz's duties were, but that he actually directed those duties (1:12; R-Ap. 112). When Schultz was hired by the Foti office, Jensen told his capitol office staff that Schultz would manage fundraising for candidates and vulnerable incumbents and that she would be located at the Assembly Republican Caucus (ARC) offices (1:8; R-Ap. 118).

[1]The record consists of three separate sub-records, one for each appellant. All of the record citations contained in the state's brief refer to the record item numbers in the *Jensen* case, Case No. 03-0106-CR.

Jensen also asserted to investigators that he believed Schultz "volunteered" to help Republican candidates with fundraising work (1:23; R-Ap. 123). This assertion is belied by numerous allegations in the criminal complaint, including the frequency and nature of the contacts Jensen had with Schultz. In addition, the complaint alleges that Jensen was aware that the proposed numbers for staff's percentage of time off the state payroll while working on campaigns were "phony" (1:30; R-Ap. 130).

Foti and Schultz likewise knew they were acting inconsistently with their duties as public officials. The complaint states that on more than one occasion, Linda Hanson, an employee of Foti's Capitol office, explicitly warned Foti that hiring Schultz as a state employee for strictly campaign-related chores was improper, but Foti and Jensen went ahead with the plan nonetheless. Hanson told Foti that "there was no way that Schultz was going to do that kind of work out of the Foti Capitol office" (1:7; R-Ap. 107). Schultz did so anyway, under the direction of Jensen and Foti.

In early to mid-1999, ARC director Jason Kratochwill spoke with Schultz, Jensen, and Foti about relocating Schultz to non-state property so that Schultz would not be engaging in private, campaign fundraising on state property (1:12; R-Ap. 112). Schultz took the position that if she moved to space owned by the Republican Party there would still be evidence, such as her use of state e-mail, revealing that she was a state employee and that it would be too obvious if she did all of her fundraising at Republican Party headquarters (*id.*). Jensen, Foti, and Ladwig opposed moving Schultz to privately rented space because of the expense that would represent to private campaign budgets (*id.*). In April or May 2000, Kratochwill met with Foti and asked him if Schultz could be relocated from the publicly funded ARC space to the privately funded Republican Party of Wisconsin (*id.*). Foti said no (*id.*).

In May 2001, when newspaper articles appeared regarding the caucuses, Schultz told a graphic artist at the ARC that Schultz could be in a lot of trouble, perhaps facing jail, if people found out what she did (1:16; R-Ap. 116). Schultz said that what she did would get her into a lot more trouble than what the graphic artists did (*id*.).

Tom Petri, also an employee at the ARC, stated that after newspaper articles appeared alleging widespread use of state resources for campaign activities, Schultz told Petri that she had to "clean up the office," meaning that she wanted to remove campaign items from her space at the publicly funded ARC (1:21; R-Ap. 121). Shortly thereafter, Petri walked through Schultz's ARC office and noticed that it had been "cleaned out."

Lyndee Wall, an ARC employee, offered to help Schultz get rid of campaign-related items from her office and Schultz replied that she did not have a single "legitimate," that is, non-campaign related, item in her office (1:22; R-Ap. 122).

In light of their demonstrated knowledge that what they were doing was unlawful and inconsistent with the duties of their public office, as indicated by their express acknowledgement and their efforts to conceal their wrongdoing, under *Tronca*, petitioners lack standing to challenge the statute on grounds of vagueness.

II. PETITIONERS FAIL TO DEMONSTRATE THAT THE OFFICIAL MISCONDUCT STATUTE, AS APPLIED IN THIS CASE, IS VAGUE BEYOND A REASONABLE DOUBT.

Petitioners assert that § 946.12(3) is unconstitutionally vague as applied to them because that

statute does not define "duties" and therefore does not provide sufficient notice.

In light of the facts set forth above establishing that they did indeed know they had a duty to refrain from conducting campaigns on state time using state resources, it is disingenuous for petitioners to argue that they had no notice of such a duty.

A. Legal standards governing vagueness claims.

A party seeking to invalidate a statute on grounds of vagueness must prove that it is unconstitutionally vague beyond a reasonable doubt. *State v. Pittman*, 174 Wis.2d 255, 276, 496 N.W.2d 74 (1993). Courts "indulge every presumption to sustain the constitutionality of a statute." *State v. Wickstrom*, 118 Wis.2d 339, 351, 348 N.W.2d 183 (Ct. App. 1984).

Facing that heavy burden of proof, anyone challenging a statute on vagueness grounds must first show that "'because of some ambiguity or uncertainty in the gross outlines of the conduct prohibited by the statute, persons of ordinary intelligence do not have fair notice of the prohibition ….'" *Pittman*, 174 Wis.2d at 276 (citation omitted). A statute provides fair notice if there is "sufficient warning to one wishing to obey the law that his conduct comes near the prescribed area." *Tronca*, 84 Wis.2d at 86.

The second requirement to invalidate a statute is to prove that those who enforce the laws must create their own standards rather than apply standards set forth in the statutes. *Pittman*, 174 Wis.2d at 276-77. Courts must bear in mind that enforcement of any statute requires judgment, and this fact does not make a statute vague. *Kalt v. Milw. Bd. of Fire & Police Comm'rs*, 145 Wis.2d 504, 512, 427 N.W.2d 408 (Ct. App. 1988). A statute is not vague "'simply because "there may exist particular

instances of conduct the legal or illegal nature of which may not be ascertainable with ease.'"' *Pittman*, 174 Wis.2d at 276-77. All that is required is a "'fair degree of definiteness.'" *State v. Courtney*, 74 Wis.2d 705, 710, 247 N.W.2d 714 (1976) (citation omitted). "'[O]ne who deliberately goes perilously close to an area of proscribed conduct'" assumes the risk "'that he may cross the line.'" *Id*. at 710-11 (citation omitted). Therefore, a statute is not vague simply because the boundaries of the prohibited conduct are "somewhat hazy" or that what "is clearly lawful shades into what is clearly unlawful by degree …." *Id*. at 711.

A person whose conduct is clearly prohibited by the terms of a statute does not have standing to base a vagueness challenge on hypothetical fact situations, since his case represents a permitted application. *Milwaukee v. K.F.*, 145 Wis.2d 24, 34, 426 N.W.2d 329 (1988); *Pittman*, 174 Wis.2d at 278. This is true even where a defendant's first amendment rights are implicated. *K.F.*, 145 Wis.2d at 34. Thus, the only question is whether, on *the facts of this case*, "'one bent on'" obeying § 946.12(3) would be unable to discern that the conduct described in the criminal complaint was near the "region of proscribed conduct." *Courtney*, 74 Wis.2d at 711.

B. Wisconsin Stat. § 946.12(3) is not unconstitutionally vague merely because it requires interpretation.

Section 946.12 reads as follows:

> **946.12 Misconduct in public office.** Any public officer or public employee who does any of the following is guilty of a Class I felony:
>
> **(1)** Intentionally fails or refuses to perform a known mandatory, nondiscretionary, ministerial duty of the officer's or employee's office or employment within the time or in the manner required by law; or

> **(2)** In the officer's or employee's capacity as such officer or employee, does an act which the officer or employee knows is in excess of the officer's or employee's lawful authority or which the officer or employee knows the officer or employee is forbidden by law to do in the officer's or employee's official capacity; or
>
> **(3)** Whether by act of commission or omission, in the officer's or employee's capacity as such officer or employee exercises a discretionary power in a manner inconsistent with the duties of the officer's or employee's office or employment or the rights of others and with intent to obtain a dishonest advantage for the officer or employee or another; or
>
> **(4)** In the officer's or employee's capacity as such officer or employee makes an entry in an account or record book or return, certificate, report or statement which in a material respect the officer or employee intentionally falsifies; or
>
> **(5)** Under color of the officer's or employee's office or employment, intentionally solicits or accepts for the performance of any service or duty anything of value which the officer or employee knows is greater or lesser than fixed by law.

Each subsection of § 946.12 contemplates a different manner in which misconduct in public office may be committed. Section 946.12(3) requires proof that a public officer or employee exercised a discretionary power in a manner inconsistent with his or her duties with the intent to gain a dishonest advantage for himself or another. Wis. JI-Criminal 1732 (1990). Subsection (3) is based in part upon a prior existing statute, § 348.29 (1951) which prohibited public officers from discounting claims or otherwise neglecting their duties.[2] *Judiciary*

[2] **348.29 Discounting claims; neglect of duty.** Any person mentioned in section 348.28 who shall … wilfully violate any provision of law authorizing or requiring anything to be done or prohibiting anything from being done by him in his official capacity or employment, or who shall refuse or wilfully neglect to form any duty in his office required by law, or shall be guilty of any wilful

Committee Report on the Criminal Code, Wisconsin Legislative Council at 176 (1953). That statute dealt with the violation of any provision of law authorizing or requiring anything to be done or prohibiting anything from being done in an official capacity. *Id.* Section 348.29 made reference to provisions of "law." The legislature did not include that language in § 946.12(3), whereas it did in §§ 946.12(1), (2) and (5). Thus, in enacting (3) in the form it did, the legislature clearly intended to reach conduct different from the other subsections, conduct that might not in itself be a specific violation of any other statute, but that nonetheless constitutes misconduct in public office.

Petitioners argue § 946.12(3) is vague because there is no specific statute that sets forth the duties of a legislator or legislative aide (petitioners' brief at 16-17). They point to statutes which enumerate certain duties for various types of public officials. While the statutes petitioners cite do set forth some specific duties for particular officials, they are not exhaustive lists of those officials' duties and cannot seriously be argued to be the only duties those officials have.

Since § 946.12 applies to all public officers and employees, many of whom will have different duties, it would be impossible for subsection (3) to list out specific duties for each type of officer or employee. As this court noted in rejecting a challenge to § 946.12(3) as being unconstitutionally vague on its face, "'[t]he fact that statute fails to itemize with particularity every possible kind of conduct which would violate such a statute, does not make it constitutionally vague." *Ryan v. State,* 79 Wis.2d 83, 91, 255 N.W.2d 910 (1977) (citation omitted).

---

extortion, wrong or oppression therein shall be punished by imprisonment in the county jail not more than one year or by fine not exceeding five hundred dollars.

Petitioners emphasize that the court of appeals, in its Certification to this court, focused on whether there exists some other statute, aside from § 946.12(3), which establishes an explicit duty to refrain from using state resources to operate campaigns. As discussed in Section II.C.2. below, there are indeed statutes establishing such a duty and that was clearly recognized by the court of appeals in its decision in this case. Regardless, it is not necessary that "duty," as that term is used in § 946.12(3), be explicitly identified in a particular statute.

The fact that a violation of § 946.12(3) can be based upon an act not specifically identified in a statute was made clear in *Tronca,* 84 Wis.2d 68. In that case, three defendants, one of them a Milwaukee alderman, were convicted as parties to the crime of misconduct in public office under § 946.12(3) for soliciting and accepting bribes in exchange for the alderman's support of a liquor license application. *Id.* Defendants in that case challenged their conviction on the grounds that the "discretionary power" exercised by the alderman, his approval of the liquor license, was an informal aldermanic privilege, not a formal discretionary power conferred by statute. *Id.* at 76. This court rejected that argument, finding that the powers of a public official "are not limited to expressly conferred powers but apply to *de facto* powers which arise by custom and usage and which are exercised under the color of office and which, by virtue of the office, tend to have a corrupt influence on public affairs." *Id.* at 80.

If a discretionary power under § 946.12(3) does not have to be specifically defined by statute, then neither does a duty for purposes of that statute. Petitioners try to distinguish *Tronca* by pointing out that *Tronca* involved a challenge to the phrase "discretionary power" not to the word "duty." Petitioners fail to explain why the court's reasoning would not apply equally to both.

Further, *Tronca* is notable for the court's discussion of whether the acts committed in that case were "inconsistent" with the alderman's duties. In finding that

they were, this court looked at two Milwaukee City Ordinances as sources for the duties of common council members. *Tronca,* 84 Wis.2d at 82. One such ordinance prohibited a common council member from voting on any matter in which he may be directly or indirectly interested. *Id.* While the alderman in *Tronca* did not technically violate that ordinance because he did not have any ability to vote on the licensing application at issue, he did agree informally to support the application. The court found this violated the intent of the ordinance and therefore was inconsistent with his duties. *Id.*

Like § 946.12(3), other Wisconsin statutes leave room for interpretation without being rendered vague. The fact that a statute presents questions of statutory construction does not mean that the statute is unconstitutionally vague. *State v. Hahn*, 221 Wis.2d 670, 682, 586 N.W.2d 5 (Ct. App. 1998). If by use of the ordinary process of statutory construction a practical and sensible meaning can be given to the statute, it is not unconstitutionally vague. *Id.* at 677.

For example, Wisconsin's disorderly conduct statute prohibits persons from engaging, in a public or private place, in "violent, abusive, indecent, profane, boisterous, unreasonably loud *or otherwise disorderly conduct* under circumstances in which the conduct tends to cause or provoke a disturbance." Wis. Stat. § 947.01. The statute does not further define "otherwise disorderly conduct," nor does any other statute define that phrase. Nonetheless, this court has held, for example, that this statutory language was not unconstitutionally vague as applied to a defendant's conduct in sending anonymous mailings with disturbing contents to three victims. *State v. Schwebke*, 2002 WI 55, 253 Wis.2d 1, 644 N.W.2d 666.

Wisconsin lacks a statute explicitly prohibiting "mailing of disturbing contents" to others, just as it lacks a statute expressly stating "the use of state resources for private campaigns is prohibited." The legislature is entitled to enact broadly worded statutes to address what it deems to be wrongful activity, whether the activity is a

broad range of disorderly conduct that disturbs others or a broad range of official misconduct that includes the diversion of public resources for private advantage. In enacting § 946.12(3) to prohibit the corrupt exercise of discretionary power "'whether by act of commission or omission,'" the legislature clearly prescribed a broad scope of conduct which could be misconduct in public office. *Tronca*, 84 Wis.2d at 81.

The interpretation required for § 946.12(3) is simply no different from that required for many other statutes. *See, e.g., State v. McCoy*, 143 Wis.2d 274, 286-88, 421 N.W.2d 107 (1988) (though phrase "'imminent physical harm'" in § 946.715 is not defined, and the phrase did not appear in any other place in Wisconsin statutes, common usage and understanding of words provides reasonable notice); *State v. Armstead*, 220 Wis.2d 626, 583 N.W.2d 444 (Ct. App. 1998) (terms "adequate treatment," "depreciate the seriousness of the offense," and "necessary to deter the child or other children," contained in Wis. Stat. § 970.032(2)(a)-(c) are "fairly definite" and not unconstitutionally vague). Wisconsin's official misconduct statute is designed to operate in a flexible manner, in the same way that many other criminal statutes operate.

Petitioners invite this court to search for ambiguity, which is not the purpose of statutory interpretation. *State v. Hamilton,* 2003 WI 50, ¶38, 261 Wis.2d 458, 661 N.W.2d 832. As shown above, many statutes require significant interpretation of a statutory word or phrase; this does not make the statutes vague. Decisions by this court and the court of appeals interpreting the official misconduct statute, as well as the pattern jury instructions for this statute, allow for such interpretation of the term "duties."

In *State v. Schwarze*, 120 Wis.2d 453, 355 N.W.2d 842 (Ct. App. 1984), the circuit court instructed the jury that the defendant, a school district accounts receivable clerk, had a duty under § 946.12(3) to disclose shortages

of money to her employer. The court of appeals held that the existence of a duty is a question of law. *Id*. at 455. Therefore, it was proper for the circuit court to instruct the jury that such a duty existed. *Id*. at 456. Petitioners here fail to provide any basis to distinguish *Schwarze* from this case.

Additionally, the pattern jury instruction for § 946.12(3), Wis. JI-Criminal 1732, specifically instructs the court to fill in the blank regarding a defendant's duty:

> The third element requires that the defendant exercised a discretionary power in a manner inconsistent with (the duties of his office) (the duties of his employment) (the rights of others). As a (position), it was defendant's duty to _____.

Petitioners point to the notes of Wis. JI-Criminal 1732 which indicate that for purposes of instructing on the defendant's duty, the court should fill in the duty imposed by statute. Wis. JI-Criminal 1732 n.5. To the extent that the jury instructions are suggesting that only a statutory duty can form the basis of a violation of § 946.12(3), those instructions are incorrect. As already discussed above, § 946.12(3) does not refer to a statutory duty and in *Schwarze* the court identified a duty based upon common law principles of agency.

Petitioners cite to *State v. Popanz,* 112 Wis.2d 166, 332 N.W.2d 750 (1983), to support their argument that because there is no statutory definition for the word "duty" in § 946.12(3), the statute is rendered unconstitutionally vague. As already discussed, numerous statutes contain phrases that are not specifically defined, yet they are not considered unconstitutionally vague. Section 946.12(3) is one of them. *Tronca*, 84 Wis.2d 68. *See also Ryan,* 79 Wis.2d at 91 (elements of § 946.12(5) while broad are not unconstitutionally vague).

Further, *Popanz* actually undercuts petitioners' argument. In that case, the defendant challenged his conviction for failing to send his children to either a

public or a private school on the ground that the statute was unconstitutionally vague because it did not define "private school." *Popanz,* 112 Wis. 2d at 172. In attempting to uphold the constitutionality of the statute, the court searched statutes, administrative rules and regulations and state agency writings for a definition of "private school." *Id.* at 174. Finding none, the court held the statute was unconstitutionally vague. *Id.* at 177. It follows from this that a statutory term can be identified not only in the statutes themselves but in other sources as well. This is consistent with the comments to § 946.12(1) by the Wisconsin Legislative Council. Those comments indicate that the duty contemplated in 946.12(1) can be imposed by "common law, statute, municipal ordinance, administrative regulation, and perhaps other sources." *Judiciary Committee Report on the Criminal Code* at 175.[3]

In the instant case, the state is able to point to several sources of petitioners' duty to refrain from using state resources to operate political campaigns, any one of which would be sufficient to sustain charges of public misconduct: (1) the duty long established in Wisconsin law of conflict-free loyalty to the public; (2) chapters 11, 12 and 19 and other relevant statutes detailed below; and (3) the Assembly's rules prohibiting such activity.

Petitioners devote numerous pages in their brief to cases from other jurisdictions which they believe support their argument that § 946.12(3) is unconstitutionally vague as applied in this case. Aside from the obvious fact that such cases are not binding precedent in Wisconsin, petitioners' reliance on these cases is misplaced because they do not support petitioners' position.

[3]Appellants criticize the court of appeals' reliance on this comment since it pertains to § 946.12(1). Appellants acknowledge that § 946.12(3) encompasses even broader conduct than (1) yet they fail to explain why the sources of the duty for (3) could not stem from at least the same sources as (1).

Petitioners first cite *State v. DeLeo*, 356 So.2d 306 (Fla. 1978), in which the Florida Supreme Court determined that one section of the Florida misconduct statute was unconstitutionally vague. That section made it a crime for a public servant to knowingly violate or cause another to violate any statute or lawfully adopted regulation or rule relating to his office with the corrupt intent to obtain a benefit for himself or another. *Id*. at 307. The court later struck down a separate provision of the misconduct statute on the same grounds in *State v. Jenkins,* 469 So.2d 733 (Fla. 1985), also cited by petitioners. In that case, the section of the misconduct statute made it a crime for a public servant to knowingly refrain, or cause another to refrain, from performing a duty imposed upon him by law with the corrupt intent to obtain a benefit for himself or another. *Id.* Both of those decisions are unavailing to petitioners in that the Florida Supreme Court struck down the misconduct statute as vague on its face.

This court has already determined that § 946.12(3) is not unconstitutionally vague. *State v. Tronca,* 84 Wis.2d at 87. Even though the focus in *Tronca* was on the phrase "discretionary power," this court found that § 946.12(3) "read reasonably in its entirety, clearly gives notice of the nature of the penalties and the applicability of the statute to the conduct engaged in by the defendants." *Id.* Petitioners attempt to distinguish *Tronca* on the grounds that it involved an as applied vagueness challenge. That makes no difference in defeating the Florida cases cited by petitioners. Those cases involved facial challenges to the statutes at issue. Since this court has determined that § 946.12(3) is not unconstitutionally vague as applied in a particular case, then by necessity it cannot be unconstitutionally vague on its face.

For the same reason, petitioners' reliance on *People v. Beruman,* 638 P.2d 789 (Colo. 1982), and *State v. Adams,* 866 P.2d 1017 (Kan. 1994), is misplaced. Further, the *Adams* case is distinguishable in that the Kansas statute defined misconduct in a circular fashion,

stating that official misconduct included "[w]illfully and maliciously committing an act of oppression, partiality, misconduct or abuse of authority…." *Id.* at 1019. In other words, a defendant was guilty of official misconduct if he engaged in misconduct. The Kansas statute did not provide any further clarification of what constituted misconduct.

In contrast, § 946.12(3) defines misconduct much more specifically in that it requires a defendant to have exercised a discretionary power in a manner inconsistent with the duties of his office with intent to gain a dishonest advantage for oneself or another. While the elements of this offense are broadly drawn, they are not unconstitutionally vague.

Without discussion, petitioners also cite to a string of cases from other states to suggest that misconduct statutes can only be upheld if "the duty" alleged to have been violated is specifically defined by statute (petitioners' brief at 23-24). Many of these cases do not support the proposition put forth by petitioners. For example, in *Commonwealth v. Manlin,* 411 A.2d 532 (Pa. 1979), a deputy warden convicted of official oppression for mistreating inmates challenged his conviction on the grounds that "mistreatment" was not defined and therefore the statute was unconstitutionally vague. *Id.* Duty was not an element of the statute and the element at issue, "mistreatment," was the subject of the defendant's vagueness challenge specifically because it was not defined by statute. The Superior Court of Pennsylvania rejected this argument, finding that although "mistreatment" was not defined by statute, it is equated with abuse and has a commonly understood meaning. *Id.* at 533-34.

In *Cook v. State,* 353 S.E.2d 333 (Ga. 1987), the Georgia Supreme Court found that the malpractice in office statute was not unconstitutionally vague just because it did not specify a particular penalty. *Id.* at 336. There is no discussion whatsoever about the elements of

that statute in that decision and it is unclear in the decision whether the term duty was even used in the statute. Regardless, the court was looking at the penalty provision, not the definition of the elements.

Even if these cases cited by petitioners stand for the proposition that official misconduct statutes are constitutional when duties are specifically defined by statute, it does not follow that the statutes which do not define duties are therefore unconstitutional.

Petitioners ignore cases in Wisconsin and other states that have upheld the constitutionality of misconduct statutes which contain terms that are not specifically defined by statute. This court in *Ryan* determined that § 946.12(5) is not unconstitutionally vague, finding that while written broadly the elements were not so broad as to render the statute unconstitutionally vague. *Ryan,* 79 Wis.2d at 91. Included in those elements was the performance of "any service or duty." Thus, this court has already determined that the phrase "duty" is not unconstitutionally vague in the context of § 946.12.

Other states have reached similar conclusions. The Oregon Supreme Court rejected a vagueness challenge to a provision of the Oregon misconduct statute which is similar to § 946.12(3). *State v. Florea,* 677 P.2d 698 (Or. 1984). The Oregon provision makes it a crime for a public servant to knowingly perform an act constituting an unauthorized exercise in his official duties if done with intent to obtain a benefit or to harm another. *Id.* at 700. The defendant in that case challenged his conviction for misconduct on the grounds that the term "official duties," was not defined and therefore vague. *Id.* The court rejected this argument. *Id See also State v. Andersen,* 370 N.W.2d 653, 662-63 (Minn. Ct. App. 1985) (misconduct statute not unconstitutionally vague merely because "lawful authority" derives meaning from set of rules not contained in statute itself or because "forbidden by law" does not require that conduct be forbidden by particular penal statute); *People v. Kleffman*, 412 N.E.2d

1057, 1060-61 (Ill. App. Ct. 1980) (misconduct statute which does not define terms "lawful authority" or "personal advantage" not unconstitutionally vague); *Margraves v. State,* 34 S.W.3d 912, 921 (Tex. Crim. App. 2000) (misconduct statute which prohibits misapplication of government property not vague in conviction of public official who used university airplane for private use).

Regardless, as already discussed above, this court has upheld the constitutionality of the misconduct statute even though particular phrases such as "discretionary power" are not specifically defined. Further, § 946.12(3) is not unconstitutionally vague as applied in this case because the duty that petitioners violated in this case is clear.

C. Petitioners had adequate notice that they had a duty, as contemplated by § 946.12(3), to refrain from using state employees and resources to conduct private campaign activity.

The duty that petitioners are charged with violating was the duty to refrain from using public resources to operate private ventures such as private election campaigns.

In arguing that a reasonable person could not be expected to know that a public official or employee has a duty to refrain from using state time and resources to operate private election campaigns, petitioners assert that the vagueness of the official misconduct statute is somehow exposed by the fact that the state and the courts continually point to additional sources that identify a public official's duty to refrain from conducting campaigns using state resources. That the sources are ubiquitous only demonstrates the weakness of petitioners' vagueness challenge, not its strength. Further, as stated by the court of appeals, "[t]he defendants cite no authority for the proposition that we are restricted to an exclusive

statute or one exclusive source to ascertain his or her duty." (Slip op. at 8, ¶ 17).

Petitioners also contend that the sources of this duty identified by the court of appeals are inapplicable. This court is not confined to the sources of a public official's duties cited by the court of appeals or identified in the criminal complaint in determining whether the statute provides sufficient notice to survive a vagueness challenge. Therefore, in addition to addressing the sources of petitioners' duties identified by the court of appeals and addressed in petitioners' brief, the state discusses other sources of the duty to refrain from hiring and directing employees to conduct private election campaigns using state funds and resources.

1. Petitioners had a clear fiduciary duty to the public to refrain from using taxpayer dollars to run private political campaigns.

One source of petitioners' duty to refrain from using state employees and resources for private campaigns stems from the fiduciary nature of their positions as public officials and public employees. This fiduciary duty has long been recognized in Wisconsin: A public employee may not use public property for private gain. *Milwaukee v. Drew*, 220 Wis. 511, 518, 265 N.W. 683 (1936). A legislator violates her fiduciary duty as a public official by, for example, representing a private party before a government agency. *State v. Catlin*, 2 Wis.2d 240, 249-50, 85 N.W.2d 857 (1957) (acting in dual roles of legislator and attorney for client compromises requirement that legislator act only "in what he conceives to be the public interest"; even full disclosure would not overcome conflict). "A public office is created by law, not for the benefit of the officer but for the public." *State ex rel. Duesing v. Lechner*, 187 Wis. 405, 409, 204 N.W. 478 (1925).

This long-standing duty has been recognized as a duty for purposes of § 946.12(3). In *Schwarze*, for example, the court held that a school district employee had a duty to report shortages of public money, under the theory of master (the public) and servant (the public employee). 120 Wis.2d at 456. The defendant in *Schwarze* did not steal these public funds herself. Instead, she became aware that they had been stolen, and failed to exercise the discretionary authority of her official position to disclose the shortages to her superior. In failing to make full disclosure of material facts bearing on her official responsibility, the public employee placed her personal interest in protecting the thief above her official duties to the public, in violation of § 946.12(3).

Relative to *Schwarze,* this case presents an even more obvious duty in that it is axiomatic that public officials and employees cannot covertly funnel taxpayer dollars into private ventures such as election campaigns.

Courts from other jurisdictions have also upheld misconduct charges based on an official's breach of his fiduciary duty to the public. For example, in *People v. Scharlau*, 565 N.E.2d 1319, 1323 (Ill. 1990), elected city commissioners were charged under an official misconduct statute which provided that a public officer commits misconduct when that official performs an act "in excess of his lawful authority" to "obtain a personal advantage for himself." The commissioners had negotiated a settlement in a voting rights action which established a transition period during which the commissioners would remain employed by the city for three years at a salary they themselves determined. *Id*. at 1321.

The Illinois Supreme Court held that, in securing for themselves the three-year terms of employment, the commissioners exceeded the scope of their authority and could be properly charged for official misconduct:

> Defendants had a duty to act in the best interests of the city. They also had a duty to refrain from using their positions as city commissioners for personal

> benefit. We agree that the defendants' settling the lawsuit was within their lawful authority. We find, however, that defendants' arranging for their own employment for a fixed term and salary was outside that authority. Public officials are expected to adhere to the highest standards of ethical conduct.

Id. at 1326. Here, each petitioner is alleged to have covertly used his or her official position for personal benefit, namely, to directly operate private campaigns with which they were associated.

As stated in *State v. Maiorana*, 573 A.2d 475, 479 (N.J. Super. 1990), a New Jersey criminal case involving alleged misconduct in office:

> When constructing statutes which prescribe the duties and obligations of public officials, it is a practical impossibility to spell out with specificity every duty of the office, and therefore courts take judicial notice of the duties which are inherent in the very nature of the office.

See also United States v. Lopez-Lukis, 102 F.3d 1164, 1169 (11th Cir. 1997) (public officials inherently owe a fiduciary duty to the public to make governmental decisions in the public's best interest); *State v. Weleck*, 91 A.2d 751, 756 (N.J. 1952) ("Duties may be imposed by law on the holder of an office in several ways: (1) they may be prescribed by some special or private law ...; (2) they may be imposed by a general act of the Legislature ...; or (3) they may arise out of the very nature of the office itself.") (citations omitted); *State v. Deegan*, 315 A.2d 686, 695 (N.J. Super. 1974) (citation omitted) ("'These obligations are not mere theoretical concepts or idealistic abstractions of no practical force and effect; they are obligations imposed by the common law on public officers and assumed by them as a matter of law upon their entering public office.'"); *State v. Parker*, 592 A.2d 228, 235 (N.J. 1991) (official misconduct statute does not require that the underlying act be criminal in nature).

Thus, petitioners were bound by a well-established fiduciary duty to the public to use public funds only on behalf of the public and not on behalf of private political campaigns.

2. The duty to refrain from using state resources for private campaigns has been codified by the Legislature.

Even though petitioners' duty to refrain from using state resources for private purposes was not required to be set forth by statute, that duty is repeatedly set forth in the statutes and the Assembly's own rules.

a. Statutory provisions prohibit the conduct petitioners engaged in.

The Legislature has enacted numerous statutory provisions that prohibit the use of state resources for private campaigns.[4]

While no one statute contains an express statement using the words "conducting political campaigns on state time using state resources is prohibited," the statutes taken together in effect produce that result. These statutes regarding campaign financing, prohibited election practices, and the duties of public officials demonstrate unequivocally that legislators act inconsistently with their official duties when they run private political campaigns using state resources or hire others to do so.

A campaign for office in Wisconsin is a private, regulated venture, not a function of legislative authority. A collective reading of chapters 11, 12 and 19 exhibits a legislative intent to keep political campaigns well-

[4]For the court's convenience, the state has included the text of these statutes in its appendix (R-Ap.).

regulated and distinct from the work public officials are required to perform. These statutes are premised on a policy that in a democracy, citizens elect public officials to act for the common good; public officials may not treat the public's resources as their own in operating private campaigns.

Restrictions on the financing of election campaigns have long existed in Wisconsin. For example, in *State ex rel. Orvis v. Evans,* 229 Wis. 304, 282 N.W.14 (1938), this court examined campaign finance laws to determine whether a disbursement by a candidate of mirrors and match containers for political purposes would render an election for a municipal court judge null and void.

The current campaign financing restrictions are contained in chapter 11, enacted in 1973. Ch. 334, Laws of 1973. As expressly stated therein, one of the purposes of chapter 11 is to "enable candidates to have an equal opportunity to present their programs to voters" and to ensure that the true source and extent of support for a candidate is fully disclosed. Wis. Stat. § 11.001(1) (R-Ap. 108). The legislature has also made a policy determination that in order "to ensure fair and impartial elections," officeholders are "preclud[ed] … from utilizing the perquisites of office at public expense in order to gain an advantage over nonincumbent candidates who have no perquisites available to them." Wis. Stat. § 11.001(2) (R-Ap. 108).

Clearly, Jensen and Foti were circumventing the entire purpose of chapter 11 by using the perquisites of their offices at public expense in order to gain an advantage over nonincumbent candidates in their own campaigns and in the campaigns of other candidates. Schultz knowingly helped them to do so.

Petitioners' conduct conflicts directly with several specific prohibitions found in chapter 11. Section 11.36(1) precludes any person from soliciting services for political purposes from any state employee

who is engaged in his or her official duties (R-Ap. 149). Jensen and Foti solicited Schultz and other ARC employees to perform services for political purposes while engaged in their official duties by directing them to engage in campaign activity using state computers, supplies and office space during hours when the ARC offices were open to the public.

Sections 11.36(3) and (4) expressly prohibit the use of state offices for the solicitation or collection of campaign contributions (R-Ap. 149). Here, Foti and Jensen hired and supervised Schultz to use Jensen's and Foti's offices, offices in the capitol annex, and offices at the ARC to conduct campaign fundraising and other private campaign activities (1:13; R-Ap. 113). In addition to the facts set forth above, the complaint alleges that lobbyists dropped off contribution checks at the Foti capitol office, stating words to the effect of "This needs to get to Sherry [Schultz]" (1:14; R-Ap. 114). Schultz had ARC graphic artists designing and preparing fundraising invitations (1:16; R-Ap. 116). She was the person legislators and staff at the ARC came to for fundraising materials and she spearheaded fundraising efforts for the Republican Assembly Campaign Committee (*id*.). In addition to soliciting campaign contributions herself, Schultz had ARC employee, William Cosh, doing the same (1:20; R-Ap. 120). Jensen expected Schultz to make fundraising calls and raise money for specific campaign races (*id*.). Jensen himself made fundraising calls from his office and brought in campaign checks for his staff to enter into a database (1:35-36, 38; R-Ap. 135-36, 138). He was aware that his staff stuffed envelopes with fundraising letters in his office (1:35; R-Ap. 135). Foti, too, brought in campaign contributions for his staff to keep track of (1:14; R-Ap. 114).

Numerous other provisions in chapter 11 demonstrate the legislature's determination that state resources cannot be used for campaign activity. Even in instances in which these provisions do not apply on their face, they nevertheless provide further notice to

petitioners that using ARC staff and resources for private campaigns was inconsistent with their duties. For example, § 11.37 restricts use of state vehicles for campaign purposes (R-Ap. 150). It would be absurd to prohibit the use of state vehicles if all other state resources were fair game for use by a public official in pursuing private campaign operations.

Petitioners Jensen's and Foti's conduct also fits within the literal terms of § 12.07(4), which prohibits making state employment contingent on the performance of campaign activities (R-Ap. 151-152). Foti and Jensen hired Schultz specifically for that purpose (1:7; R-Ap. 107).

In addition to the long-standing restrictions found in chapters 11 and 12, petitioners' duty to refrain from using state resources for private campaign activity is also articulated in chapter 19. That chapter is a logical place to look in determining one's duties under § 946.12(3) since it is entitled, "General Duties of Public Officials," and specifically, the "Code of Ethics." This is where one "bent on obedience" to the law would logically look first.

Section 19.46(1)(b) specifically states that "no state official may … (b) [u]se his or her office or position in a way that produces or assists in the production of a substantial benefit, direct or indirect, for … an organization with which the official is associated." (R-Ap. 156).

Similarly, § 19.45 states, in relevant part:

> (2) No state public official may use his or her public position or office to obtain financial gain or anything of substantial value for the private benefit of himself or herself ..., or for an organization with which he or she is associated. …
>
> ….
>
> (5) No state public official may use or attempt to use the public position held by the public

> official to influence or gain unlawful benefits, advantages or privileges personally or for others.

(R-Ap. 155).

Under these statutes, petitioners had a duty to refrain from using their offices to assist private political campaigns and organizations such as Taxpayers for Jensen and the Republican Assembly Campaign Committee. Petitioners' actions clearly violated the duties established by these statutory provisions.

Section 19.45(1) reaffirms the clear common law of all public officials' duties to act on behalf of the public rather than for personal gain:

> (1) The legislature hereby reaffirms that a state public official holds his or her position as a public trust, and any effort to realize substantial personal gain through official conduct is a violation of that trust. This subchapter does not prevent any state public official from accepting other employment or following any pursuit which in no way interferes with the full and faithful discharge of his or her duties to this state.

(R-Ap. 154-155).

Petitioners violated the public trust by using their positions as state legislators and employees for substantial personal gain rather than for the public good. They similarly had a duty under § 19.41(1) to "avoid conflicts between their personal interests and their public responsibilities," which they violated by using their public offices for their personal interests in reelecting themselves and other targeted candidates (R-Ap. 153).

Petitioners' vagueness challenge rests on the assumption that in interpreting what their duties as public officials are under § 946.12(3), and deciding whether their actions might be inconsistent with such duties, those bent on obedience could not be expected to consider chapters of the Wisconsin Statutes such as "General Duties of

Public Officials" (chapter 19) and the Code of Ethics contained in that chapter; "Campaign Financing" (chapter 11); or "Prohibited Election Practices" (chapter 12). This argument should fail. Any reasonable public official or employee attempting to determine what his or her "duties" are as contemplated by § 946.12(3) would believe that, at the very least, it encompassed the requirements set forth in the "General Duties of Public Officials" and the Code of Ethics. Reasonable persons wondering whether conducting campaign activities on state taxpayer dollars would be "inconsistent with the duties of his office or employment" under § 946.12(3) would reasonably look to "Campaign Financing" (chapter 11) and "Prohibited Election Practices" (chapter 12) for guidance. Petitioners' arguments, though couched in terms of vagueness, amount to nothing more than an assertion that "I didn't know it was against the law," or at least against this particular law, a claim that is unavailing in a court of law, and in any case is belied by the allegations in the complaint.

These statutory provisions, taken individually and collectively, provided adequate notice to petitioners that they had a duty to refrain from using state employees and resources for private election campaigns.

Petitioners challenge the court of appeals' consideration of these provisions in identifying their duties. They first argue, without explanation, that the court of appeals ignored the rule of lenity and interpreted § 946.12(3) in favor of the prosecution. Just because the court of appeals rejected petitioners' arguments does not mean that the court erred in its interpretation of the statute. While penal statutes must be construed in favor of the accused, it is equally true that a statute cannot be construed in disregard of the purposes of the statute. *Tronca,* 84 Wis.2d at 80 (citation omitted).

Petitioners next argue that when § 946.12(3) was enacted in 1953, chapters 11, 12 and 19 did not exist in anything resembling their present form, and therefore,

there can be no assumption that § 946.12(3) be read in conjunction with these chapters. However, the statutory provisions discussed above served to codify and clarify the common law fiduciary duties that public officials owe the public they serve. As stated in § 19.45(1) "The legislature hereby *reaffirms* that a state public official holds his or her position as a public trust, and any effort to realize substantial personal gain through official conduct is a violation of that trust." (R-Ap. 154-155). In other words, the statutes reaffirm, rather than create, the duties public officials owe the public and specifically delineate the various ways an official may violate the public trust.

Even if in enacting the provisions of these chapters the legislature created new duties, this does not mean those duties may not be incorporated into the misconduct in public office statute. Indeed, the fact that § 946.12 existed prior to certain specific provisions of chapters 11, 12 and 19 undercuts petitioners' arguments. In drafting the misconduct statute in the way that it did, the legislature obviously recognized that the duties of public officers could not be specifically enumerated because they would differ among public officials depending on their positions. Moreover, the duties of a particular class of public officials or employees could change substantially over time. Presumably, the legislature would have contemplated that any duties articulated in subsequent statutes (or legislative rules, for that matter) would be incorporated into the term "duties" in the official misconduct statute. These duties include both duties to refrain from certain behavior as well as duties to engage in certain behavior. Section 946.12(3) cannot reasonably be interpreted to only include those duties that existed at the time of its enactment.

b. The Assembly further emphasized that state resources cannot be used for private campaign activity.

Consistent with the statutory provisions described above, the Assembly took numerous steps to remind its members and employees of their duty to refrain from using state resources for private campaigns. The complaint alleges that on February 27, 1997, an e-mail was sent to "All Assembly; All Senate" from Wisconsin State Representative Ben Brancel, which admonished:

> An e-mail message of a political nature was inadvertently sent by a new Assembly employee today.
>
> This serves as a reminder to all Legislative staff that political activity, whether partisan or non-partisan is not permitted during working hours. Furthermore, all state owned facilities, office equipment, including the electronic mail system, and all other state owned supplies and materials are **strictly prohibited** from use for a political purpose anytime. This means both use during and after business hours.
>
> Citizenship rights to political activity and community involvement must be exercised on non-office time and equipment.

(1:5-6; R-Ap. 105-106). A similar e-mail was sent out each year by the Assembly Chief Clerk (1:6; R-Ap. 106).

The prohibition on using state resources for campaign activity is also contained in the Assembly Employe Handbook, which was admitted at the preliminary hearing:

> Political activity is not permitted during working hours. State owned facilities, office equipment, supplies, etc., may not be used for political purposes anytime. Citizenship rights to political activity and

> community involvement must be exercised on non-office time.

(32:Ex. 7 at 4; R-Ap. 160). Also admitted at the preliminary hearing was a memo from the Assembly Chief Clerk, dated May 16, 2000, which was distributed to legislators and staff. That memo specifically stated:

> Employees should not engage in a campaign activity:
>
> (a) With the use of the state's supplies, services, or facilities not available to all citizens;
>
> (b) During hours for which he or she is compensated by the State of Wisconsin;
>
> (c) At his or her office regardless of whether the activity takes place during regular office hours.

(32:Ex. 9 at 2; R-Ap. 174). The memo then goes on to describe campaign activities that are precluded, such as addressing/labeling materials for a campaign activity, or soliciting or receiving campaign contributions (*id*.). The memo also informs legislators and employees that they should not use state telephone equipment for campaign activity (*id*.).

Thus, the Assembly Employe Handbook, memos and e-mails from the Chief Clerk, and the e-mail from the former speaker, all of which summarize the statutory prohibitions described above, are unequivocal: using state offices, state supplies, or state employees on state time for campaign activities is prohibited.

Ignoring these multiple, consistent sources that prohibit the use of state resources for private campaign activities, petitioners imply that Jensen and Foti had an affirmative duty to use state resources for campaign activity under State of Wisconsin Assembly Rules 2 and 3 (1997) (17:7-9) and duties that have "developed historically" or which have been "imposed by custom and routine practices." (Petitioners' brief at 17). Petitioners

claim the court of appeals specifically rejected these rules and the duties imposed by history and custom (petitioners' brief at 1, 17). In fact petitioners never discussed them in the court of appeals. Petitioners also fail to articulate what duties have developed "historically" or by "custom and routine practices."[5]

Furthermore, petitioners' brief summary of the content of Assembly Rules 2 and 3 is misleading (petitioners' brief at 17) (17:7-9). Assembly Rule 2(1) actually states that the majority and minority party leaders "shall perform the duties assigned to them by their respective caucuses, by legislative rule, and by law." (17:7). Likewise, Assembly Rule 3(1)(s) states that the Assembly speaker shall "[p]erform any other duties assigned to the office of speaker by law, legislative rule, directive of the assembly, or custom." (17:9). Thus, these rules incorporate other duties imposed by Assembly rules and by statutes. They do not require use of state resources for private campaigns in violation of the law.

In arguing that the court of appeals wrongly overlooked Rules 2(l) and 3(s), petitioners implicitly argue that all legislators and legislative aides have an affirmative duty to operate political campaigns with state resources in order "to promote and advance the legislative agenda and the elections of like-minded legislators" (petitioners' brief at 5) (17:7-9). "Like-minded legislators" must include themselves since Count Four of the complaint alleges that Jensen hired and supervised state employees to work on his own campaign.

Petitioners' suggestion that their conduct was part of their official duties as legislators or a legislative aide is illogical, based on faulty assumptions about their

[5]The fact that appellants' conduct had been ongoing for some time does not make it legal. *See, e.g., State ex rel. Reynolds v. Dinger,* 14 Wis.2d 193, 204, 109 N.W.2d 685 (1961) (violation of law does not attain legality by lapse of time).

constituents, and only reinforces the conclusion that the charged conduct falls within the terms of § 946.12(3).

First, petitioners fail to demonstrate how spending taxpayer money to run private campaigns can be an affirmative duty of legislators and their publicly-funded aides, when there are so many prohibitions of such conduct, through internal rules, the provisions of chapters 11, 12 and 19, and through an advisory opinion of the Wisconsin Ethics Board (32:Ex. 8; R-Ap. 183-187). Certainly, petitioners cannot claim a duty to engage in conduct that has been expressly prohibited by statutory provisions and by their own internal rules. Nor do petitioners explain why, according to the complaint, they formerly believed that such conduct was improper.

Moreover, simply because Jensen and Foti took on the additional responsibility of leadership roles does not mean they were entitled to hire and supervise state employees to run campaigns any more than any other legislator would be. If the conduct is prohibited as an abuse of power, it is all the *more* important that the most powerful are restrained.

In addition, petitioners' argument is premised on peculiar assumptions about their constituents. First, it assumes that constituents would condone use of their taxes to pay for the campaign operations of persons whom "leadership" has decided should be in the legislature, people who are not necessarily known to those constituents and may not even be in their voting districts. It also assumes that these citizens would be just as happy to have their elected representatives use public money to operate private political campaigns on behalf of others or themselves as do an honest day's legislative work.

Petitioners' argument further assumes that a legislator's constituency is a static entity, and that once constituents elect a certain legislator, they favor that legislator and his or her policy agenda in perpetuity. However, constituencies can change and so can their opinions of their elected officials, which is why legislators

are elected to finite terms of office and are subject to re-election. Therefore, an incumbent legislator cannot justify using state resources to work on his own campaign or the campaigns of "like-minded" individuals as being in the interest of his constituency.

A legislator's use of state resources for private campaign activity is in any case a secret use of public funds that corrupts the democratic process. The statutes relied upon here by the state recognize that incumbents who use the panoply of state resources that are available to them, but not to non-incumbents, in conducting political campaigns have an unfair advantage, thus distorting the political process.

It simply cannot seriously be argued that in light of the laws and rules prohibiting the charged conduct, petitioners had a duty to engage in it. Nor can it be seriously argued that state legislators are unable to draft, promote, support and pass legislation, which are their duties as legislators, without using state employees to operate political campaigns on state time, using state resources.

Notwithstanding their reliance on Assembly Rules 2(l) and 3(s), petitioners complain that a legislative rule cannot be the basis for a duty under § 946.12(3) (petitioners' brief at 17) (17:7-9). If a court may look to common law to establish a duty on the part of an employee to report money shortages to her employer as in *Schwarze*, a court may certainly look to explicit Assembly rules in determining a representative's or a legislative aide's duties. Likewise, in *Tronca,* this court found that the "discretionary power" contemplated in § 946.12(3) could include not only those powers conferred by statute or written policy, but also those *de facto* powers arising out of custom and usage. *Tronca,* 84 Wis.2d at 77-80. If a discretionary power can be identified based upon something other than an official statute, then so might a duty.

Petitioners assert that the use of the Assembly rules as a basis for defining their duties is prohibited under *State v. Dekker*, 112 Wis. 2d 304, 332 N.W.2d 816 (Ct. App. 1983), and the court of appeals' reliance on those rules constituted improper retroactive statutory interpretation. Petitioners' argument is unpersuasive. *Dekker* did not involve a constitutional challenge to the misconduct statute. *Dekker* also did not involve § 946.12(3). Rather, the court of appeals in that case upheld dismissal of a criminal complaint charging police officers with failing to provide first aid in violation of Wis. Stat. § 946.12(1), a subsection not at issue here. Subsection (1) of § 946.12 makes it a crime to fail to perform a mandatory duty within the time or in the manner required by law. The court found that a departmental rule to provide first aid was discretionary, rather than mandatory and therefore could not be the subject of a misconduct charge under Wis. Stat. § 946.12(1).

In contrast, in this case § 946.12(3) is charged, which does not require that the duty be mandatory or established "by law." Petitioners recognize the distinction between subsection (1) at issue in *Dekker* and subsection (3) charged here (petitioners' brief at 28). Necessarily implicit in that recognition is an acknowledgement that *Dekker* is distinguishable from this case. Thus, petitioners' argument that *Dekker* was controlling precedent at the time of the alleged conduct is unsupportable and their argument regarding retroactive statutory interpretation fails.

In addition, their argument fails because this is not a retroactive interpretation of a statute as contemplated by the authority petitioners rely on, *Elections Board of the State of Wisconsin v. Wisconsin Manufacturers & Commerce*, 227 Wis.2d 650, 597 N.W.2d 721 (1999). In that case, this court held that the Elections Board had engaged in "retroactive rule-making" by creating a "new" definition of "express advocacy" that was broader than

that articulated in binding precedent at the time the defendants placed the ads. *Id*. at 681.

Unlike in *Elections Board*, in the instant case, petitioners could not reasonably have relied to their detriment on well-established authority indicating that their conduct was lawful. Nor does this court need to adopt a new definition of duty or engage in a novel reading of the campaign laws to determine that petitioners had a duty to refrain from using public resources to operate private political campaigns. These duties stem from existing legal standards, statutes and Assembly rules. And while petitioners urge that they had no notice of these duties, this assertion is belied by their own admissions and actions in attempting to conceal their conduct. *Elections Board* is therefore unavailing to petitioners.

Moreover, under petitioners' theory of retroactivity, any time a court engages in statutory interpretation, and there is no case directly on point, the court is retroactively applying that statute, in violation of the constitution. As demonstrated by the numerous appellate decisions interpreting statutes, statutory construction does not equate to an unconstitutional retroactive application of that statute.

Resorting to scare tactics, petitioners' claim that allowing the prosecution to go forward in this case "opens the floodgates for wholesale and selective prosecution of government employees and officials." (Petitioners' brief at 30). Petitioners fail to explain how this might be so. Government employees and officials may only be prosecuted under § 946.12(3) if they exercise a discretionary power in a manner inconsistent with their official duties with the intent to gain a dishonest advantage for themselves or others. Section 946.12 has withstood vagueness challenges in the past with no such flood of prosecutions ensuing. A finding that the statute is not unconstitutionally vague as applied in this case will have no different result.

In light of the clear prohibitions discussed above and petitioners' demonstrated awareness of the illegality of their conduct, their claim that they had inadequate notice of their duty to refrain from conducting campaign activities on state time using state resources is implausible.

D. Petitioners failed to establish that those who enforce and apply § 946.12(3) are not able to do so without creating or applying their own standards.

For the same reasons set forth above, petitioners have also failed to establish the second prong of the test for vagueness, that those who enforce and apply § 946.12(3) would not be able to do so in this case without creating or applying their own subjective standards. *Pittman*, 174 Wis.2d at 276-77. In light of the clear authority prohibiting petitioners' conduct, there is no need to apply subjective standards here.

Petitioners provide no reasonable alternative to the state's interpretation of § 946.12(3). Apparently, their view is that legislators and legislative staffers are simply not subject to § 946.12(3), since, under that statute, they do not consider themselves bound by any fiduciary duty, the Code of Ethics for state officials or related provisions. If a legislator commits a separate crime, such as accepting a bribe in violation of § 946.10(2), there is no need for the existence of § 46.12(3) to create duplicative liability. Petitioners simply read § 946.12(3) out of the law.

Petitioners' interpretation would also nullify other statutes that apply to public officials, such as Wis. Stat. § 946.10(1), which prohibits bestowing any property or personal advantage on a state official to intentionally induce a state official "to do or omit to do any act in violation of the officer's … lawful duty ...." "Lawful

duty" is not defined in § 946.10. Under petitioners' approach, courts lack a standard to determine when a legislator might have a lawful duty to do or refrain from doing anything.

For all of the reasons stated above, petitioners have failed to establish that § 946.12(3) is vague as applied to their conduct.

III. PETITIONERS' OVERBREADTH CHALLENGE FAILS BECAUSE THE ISSUE HAS ALREADY BEEN DECIDED ADVERSELY TO THEM IN *TRONCA*, THE OFFICIAL MISCONDUCT STATUTE DOES NOT REGULATE SPEECH, AND PETITIONERS CANNOT SHOW BEYOND A REASONABLE DOUBT THAT THE CHARGED VIOLATIONS OF § 946.12(3) ARE NOT REASONABLE, CONTENT-NEUTRAL RESTRICTIONS.

A. *Tronca* disposes of petitioners' overbreadth challenge.

Petitioners contend that § 946.12(3) infringes on protected speech and is therefore overbroad. This argument is precluded by this court's decision in *Tronca*. As in the instant case, the defendants in *Tronca* asserted that the official misconduct statute regulated speech protected by the First Amendment. 84 Wis.2d at 88. This court rejected that argument, concluding that the official misconduct statute is not unconstitutionally overbroad. *Id*. at 88-90.

B. The misconduct statute does not regulate speech and is therefore not subject to a First Amendment overbreadth challenge.

Even if petitioners' overbreadth argument were not decided against them in *Tronca*, it is precluded by this court's decision in *State v. Robins*, 2002 WI 65, 253 Wis.2d 298, 646 N.W.2d 287. In *Robins*, defendant made an as-applied challenge to the child enticement statute, arguing that application of the statute to his conduct violated his First Amendment rights. *Id*. at ¶ 39. The court refused to delve into the intricacies of the First Amendment claim, holding that the child enticement statute did not regulate speech, either on its face or as applied, but instead, regulated conduct. *Id*. at ¶¶ 40-44. As a result, the statute was not "susceptible of First Amendment scrutiny." *Id*. at ¶ 43. The court noted: "That some of the proof in this case consists of internet 'speech' does not mean that this prosecution, or another like it, implicates First Amendment rights." *Id*. at ¶ 44.

Similarly, the official misconduct statute regulates conduct, not speech. It prohibits a public official from exercising his or her discretionary power in a manner inconsistent with the duties of the official's office or employment or with the rights of others, with the intent to obtain a dishonest advantage for the official or others. Wis. Stat. § 946.12(3). That the state may have to prove its case in part through use of statements petitioners made does not make the misconduct statute one regulating speech any more than the child enticement statute addressed in *Robins*. As in *Robins*, therefore, § 946.12(3) is not "susceptible of First Amendment scrutiny," 253 Wis.2d 298, ¶ 43, and petitioners' First Amendment overbreadth challenge fails.

C. Petitioners' claim of overbreadth is meritless because the charged violations of § 946.12(3) are reasonable, content-neutral restrictions.

The genesis of the overbreadth doctrine has been attributed to the United States Supreme Court in *Thornhill v. Alabama*, 310 U.S. 88 (1940), which recognized that broadly written statutes substantially inhibiting free expression should be open to attack even by a party whose own conduct is unprotected under the First Amendment. *State v. Stevenson*, 2000 WI 71, ¶ 11, 236 Wis.2d 86, 613 N.W.2d 90.

Nevertheless, courts should utilize the overbreadth doctrine only sparingly as a tool for statutory invalidation, proceeding with caution and restraint. *Id.* at ¶ 14. "Marginal infringement or fanciful hypotheticals of inhibition that are unlikely to occur will not render a statute constitutionally invalid on overbreadth grounds." *Id*. Invalidation of statutes on grounds of overbreadth is "'strong medicine'" employed "only as a last resort." *Id*. at ¶ 44 (citing *Broadrick v. Oklahoma*, 413 U.S. 601, 613 (1973)). Therefore, a statute will not be invalidated on overbreadth grounds "because in some conceivable, but limited, circumstances the regulation might be improperly applied." *Milwaukee v. K.F.,* 145 Wis.2d 24, 40, 426 N.W.2d 329 (1988). Although some laws "may deter protected speech to some unknown extent, there comes a point where that effect—at best a prediction—cannot, with confidence, justify invalidating a statute on its face." *Broadrick*, 413 U.S. at 615.

If a court determines that a statute is overbroad, it has three options: First, apply a limiting construction to rehabilitate the statute; second, sever the unconstitutional provisions of a statute, leaving the remainder of the legislation intact, or; third, determine that the statute is not amenable to judicial limitation or severance and invalidate

it "upon a determination that it is unconstitutional on its face." *Stevenson*, 236 Wis.2d 86, ¶ 15.[6]

When one challenges the constitutionality of a statute, the burden of proof falls upon that party to prove that the statute is unconstitutional beyond a reasonable doubt. *Winnebago County Dep't of Soc. Servs. v. Darrell A.*, 194 Wis.2d 627, 637, 534 N.W.2d 907 (Ct. App. 1995). When the statute implicates the exercise of First Amendment rights, however, the burden shifts to the government to prove beyond a reasonable doubt that the statute passes constitutional muster. *Lounge Management v. Town of Trenton*, 219 Wis.2d 13, 20, 580 N.W.2d 156 (1988).

As stated, the official misconduct statute does not regulate speech. Even if this court declines to rule that the statute may not be challenged on First Amendment grounds, it must, at a minimum, hold petitioners to their burden of proving the statute unconstitutional beyond a reasonable doubt. Petitioners have failed to meet their burden.

The constitutional right to freedom from state interference with one's right to expression is not absolute. *State v. Bagley*, 164 Wis.2d 255, 265, 474 N.W.2d 761 (Ct. App. 1991). The government is not required "freely to grant access to all who wish to exercise their right to free speech on every type of Government property without regard to the nature of the property or to the disruption that might be caused by the speaker's activities." *Cornelius v. NAACP Legal Def. & Educ. Fund*, 473 U.S. 788, 799-800 (1985).

Like any property owner, the state may reserve its property for its lawfully dedicated use. *Adderley v. Florida*, 385 U.S. 39, 47 (1966). Even a complete ban on

[6]If this court finds any constitutional defect, the state respectfully seeks leave to address potential limiting constructions in a supplemental brief.

free expression may be imposed in a non-public forum if the prohibition is reasonable and content-neutral. *United States Postal Serv. v. Council of Greenburgh Civic Assoc.*, 453 U.S. 114, 132 (1981).

A government office is used to carry out the government's business, and is therefore a nonpublic forum, so that any restriction need only be reasonable and content-neutral. *See Cornelius*, 473 U.S. at 805-806; *United Auto Workers, Local Union 1112 v. Philomena*, 700 N.E.2d 936, 949 (Ohio Ct. App. 1998).

The state is entitled to address a broad problem on a broad scale. Governments may place "'evenhanded restrictions on the partisan political conduct' of their employees, inasmuch as 'such restrictions serve valid and important state interests.'" *Mining v. Wheeler*, 378 F. Supp. 1115, 1121 (W.D. Mo. 1974) (upholding constitutionality of municipal "Little Hatch Act")(quoting *Broadrick*, 413 U.S. at 606); *see also United States Civil Service Comm'n v. National Ass'n of Letter Carriers*, 413 U.S. 548 (1973) (upholding the Hatch Act's provision prohibiting executive branch employees from actively participating in political campaigns).

The statutory scheme prohibiting incumbency abuse in Wisconsin addresses the particular problem of the operation of political campaigns using public resources. It establishes a simple, understandable rule: A legislator may not have his or her staff work directly on campaigns during state time or using state resources. This puts well-defined resources out of bounds for well-defined activity. No group, cause, or message is singled out for restriction. All state officials and employees are prohibited equally from engaging in this activity.

Petitioners pose several hypotheticals, none of which resembles the charged case and each apparently representing petitioners' best efforts to demonstrate ambiguity and overbreadth (petitioners' brief at 40-41). In fact, they only demonstrate the clarity of the law. In the first hypothetical, a legislator seeks a copy of a campaign

finance report with the purpose of using it to advocate for proposed campaign finance legislation, and is glad that it may also shame a political opponent (*id*. at 40). This is clearly not prohibited activity, because the legislator has a legislative, non-campaign purpose. In sharp contrast, when Jensen had state employees use their publicly-funded positions to operate Taxpayers for Jensen, or when Foti had Schultz spend her time producing campaign finance reports for campaign committees, as alleged, *inter alia*, in the complaint, those activities are prohibited. Petitioners' hypothetical only demonstrates that a line can be drawn to prohibit and prosecute the conduct charged in this case.

In the second hypothetical, petitioners suggest that returning a phone call to a constituent could be construed as improper political activity. Constituent contact related to legislative business does not run afoul of the law at issue here, even if the legislator and his staff hope that responding to constituents will encourage campaign contributions *when and if solicited from outside the Capitol*, which will then be *collected and accounted for in campaign finance reports assembled outside the Capitol*. In contrast, during work hours or on state phones, legislative aides may not solicit contributions or organize campaign fundraising events. It is not "campaigning" to "return the phone call of a constituent who has a question on the legislator's position on an issue." (Petitioners' brief at 41). Petitioners' professed confusion is disingenuous.

For years, agencies such as the Wisconsin Legislative Council Staff have had no problem summarizing the rule in bulletins and memos. *See, e.g.,* Wisconsin Legislative Council Staff, *"Ethics Code Requirements," Information Bulletin 99-5,* at 8-9 (January 1999). Legislators are to ask themselves,

> Am I using the state's time, resources or facilities in my campaign for elective office?"
>
> ….

> **Question**: May a legislator's staff work on the legislator's campaign?
>
> **Answer**: The Ethics Code prohibits a legislator's staff from working on the legislator's campaign during state time or with the use of state facilities.

Official misconduct of the type charged in this case is directly related to the effective and credible operation of state government in Wisconsin and narrowly tailored to achieve its purpose. Its purpose requires that it apply to many buildings and bind all state officials and employees. It is a reasonable, content-neutral restriction that chills only conduct sought to be restricted, that is, abuses of public resources uniquely available to incumbents for the dishonest advantage of incumbents. Therefore, petitioners' motion to dismiss based on overbreadth was properly denied.

IV. PETITIONERS HAVE FAILED TO SHOW BEYOND A REASONABLE DOUBT THAT THE OFFICIAL MISCONDUCT CHARGES IN THIS CASE VIOLATE THE SEPARATION OF POWERS DOCTRINE.

Petitioners claim that application of § 946.12(3) to their conduct violates the separation of powers doctrine. It is petitioners' burden to establish such a constitutional violation beyond a reasonable doubt. *State v. Holmes*, 106 Wis.2d 31, 38, 315 N.W.2d 703 (1982). For the reasons set forth below, petitioners have not met their burden and their separation of powers claim must fail.

A. The courts may adjudicate the criminal charges against petitioners in this case, even if Assembly rules must be applied to define their duties as legislators or legislative aide.

In support of their argument, petitioners first assert that "the legislature has exclusive authority to establish the duties of its members." (Petitioners' brief at 42) (initial caps omitted). As a preliminary matter, even if this were true, the state notes that the legislature has established the duty to refrain from running private political campaigns through taxpayer dollars, through the enactment of § 946.12(3) and provisions in chapters 11, 12 and 19, and by creation of the Assembly documents and e-mails discussed above.

More fundamentally, however, petitioners' argument amounts to nothing more than an assertion that as members of the legislature and as a legislative aide, they are beyond the reach of the criminal law. While petitioners purport to acknowledge that they are subject to criminal laws like everyone else (petitioners' brief at 45), in essence they are asserting that prosecution for any crime committed in their official capacity must necessarily violate the separation of powers doctrine. Such a position is untenable.

Petitioners cite art. IV, § 8 of the Wisconsin Constitution, which provides that the Wisconsin State Senate and Assembly "'may determine the rules of its own proceedings, punish for contempt and disorderly behavior, and with the concurrence of two-thirds of all the members elected, expel a member; but no member shall be expelled a second time for the same cause.'" (Petitioners' brief at 42-43). They further cite *State ex rel. LaFollette v. Stitt*, 114 Wis.2d 358, 367, 338 N.W.2d 684 (1983), in which the court stated that "'recourse against legislative errors, nonfeasance or questionable procedure is by political action only'" (*id*. at 41).

Prosecuting petitioners for criminal offenses under § 946.12(3) does not violate art. IV, § 8 or this court's holding in *Stitt*. Neither the executive nor the judicial branch is interfering with the Assembly's ability to "determine the rules of its own proceedings" or is impeding the due functioning of the legislature. Nor does the state attempt to prosecute for contempt or disorderly behavior or seek to expel anyone from the legislature. The state is merely looking at an existing legislative rule as one source for determining what duties petitioners had and whether they acted inconsistently with those duties, for purposes of enforcing a criminal statute. That statute was obviously designed to hold public officials accountable for the misuse of their position. The executive branch has the obligation to enforce such statutes. Wis. Const. art. V, § 4.

This court rejected a similar separation of powers argument in *In re John Doe Proceeding,* 2004 WI 65, 272 Wis. 2d 208, 680 N.W.2d 792. In that case petitioners challenged a John Doe subpoena issued to the Legislative Technology Services Bureau on the grounds that the subpoena intruded into the legislature's "core zone" of authority and that § 13.96 was a "rule of proceeding" under art. IV, § 8, that only the legislature could interpret. *Id.* at 272 Wis.2d 208, ¶ 24. In rejecting these arguments, this court noted that the subpoena was not attempting to change the way in which the legislature functions but rather was attempting to gather information in a criminal investigation. *Id.* at 272 Wis.2d 208, ¶ 26. The court further noted that if all of the documents maintained by the LTSB were out of bounds to a criminal investigation, "the legislature would have effectively immunized its members and employees from criminal prosecution and in so doing usurped the role of the executive branch in assuring the faithful execution of all the laws and the prosecution of crime." *Id.*

While recognizing that courts generally are unwilling to decide whether the legislature adhered to its

own rules governing how it operates, this court found that § 13.96, which makes the electronic records of the legislature confidential, was not a rule of proceeding for purposes of art. IV, § 8, because it had "nothing to do with the process the legislature uses to propose or pass legislation or how it determines the qualifications of its members." *Id.* 272 Wis.2d 208, ¶ 30. So too is the rule at issue here not a "rule of proceeding." A rule that reiterates statutory prohibitions on the use of state resources for private campaigns has nothing to do with the process the legislature uses to propose or pass legislation or how it determines the qualifications of its members. Instead it prohibits the use of state resources for activities that are *not* related to those functions.

In *In re John Doe Proceeding,* this court found compelling the fact that the subpoena sought information in the course of a criminal investigation, a function assigned to the executive branch. *Id.* 272 Wis.2d 208, ¶¶ 26, 31. In the present case, the executive branch is carrying out its function of prosecuting criminal activity.

Petitioners suggest that any inquiry into what duties legislators ask their employees to perform is "constitutionally off limits" because "the legislative process intertwines legislative, political and campaign considerations." (Petitioners' brief at 44). By the same logic, if Jensen and Foti had asked Schultz to blackmail a political opponent or accept a bribe from a constituent, this too would be "constitutionally off limits." Moreover, this case does not involve the issue of legislative acts that have a campaign component; it involves pure campaigning, devoid of legitimate legislative activity, which is why it was charged.

Petitioners' suggestion that only the legislature may define, interpret and enforce rules against its members would invalidate not only § 946.12(3) but also all of the provisions regulating legislators' activities contained in chapters 11, 12 and 19, discussed above. Petitioners have failed to support their radical position.

B. The official misconduct charges in this case are justiciable because each charge rests on unambiguous legal standards and does not interfere with any unique function of the legislature.

Petitioners next assert that what constitutes the duties of legislators and aides is a nonjusticiable "political question."

In *Baker v. Carr*, 369 U.S. 186, 217 (1962), the United States Supreme Court identified six alternative factors to be considered in determining whether an issue is a "political question" and therefore nonjusticiable. At least one of the factors must be "prominent on the surface" if an issue is to be determined nonjusticiable. *Id.* Further, such a determination must be made or based upon the particular facts and posture of an individual case. *Id. See also United States v. Rostenkowski,* 59 F.3d 1291, 1310 (D.C. Cir. 1995). Therefore, any hypothetical situations raised by petitioners should be disregarded as they are not relevant to the question of justiciability in this case.

Petitioners address only the first two factors set forth in *Baker v. Carr*: a textually demonstrable constitutional commitment to a coordinate political department and a lack of judicially discoverable and manage standards for resolving the issue. In ignoring the other factors, petitioners implicitly concedes that those factors are not relevant here. The first and second present no obstacle either.

In arguing for the applicability of the first factor, constitutional commitment of the issue to another branch, petitioners merely reassert their arguments related to art. IV, § 8, discussed above. As stated, this constitutional provision addresses legislative procedural rules, punishment for "contempt" and "disorderly" behavior, and

expelling members. It is inapplicable to the criminal charges at issue here.

With respect to the second *Baker* factor, petitioners argue there are no judicially manageable standards to prosecute them under § 946.12(3) because there are no judicially discoverable and manageable standards for distinguishing between "official" and "political" work (petitioners' brief at 37).

The lack of judicially discoverable and manageable standards for resolving the issue, was addressed in *Rostenkowski*, 59 F.3d 1291. This case cuts against petitioners' position.

Rostenkowski involved prosecution of Illinois Congressman Daniel Rostenkowski for misappropriation of public funds. Rostenkowski argued that the prosecution was based on the prosecutor's interpretation of the Rules of the House of Representatives, in violation of the Rulemaking Clause and the separation of powers doctrine. *Id*. at 1306. The Rulemaking Clause, like art. IV, § 8 of the Wisconsin Constitution, empowers congress to "determine the rules of its proceedings, punish its members for disorderly behavior, and with the concurrence of two-thirds of all the members elected, expel a member." U.S. Const. art. I, § 5.

While the *Rostenkowski* court held that, when internal legislative rules are overly ambiguous, the courts may not invade the legislature's constitutional rulemaking authority by judicial improvisation; it clearly articulated the converse of that principle:

> If a particular House Rule is sufficiently clear that we can be confident of our interpretation, however, then that risk is acceptably low and preferable to the alternative risk that an ordinary crime will escape the reach of the law merely because the malefactor holds legislative office.

Id. at 1306 (citation omitted). Thus, a court may interpret an internal legislative rule if there is a reasonably "discernible legal standard." *Id.* (citing *United States ex rel. Joseph v. Cannon,* 642 F.2d 1373 (D.C. Cir. 1981)).

The *Rostenkowski* court further observed that internal legislative rules are not to be viewed in the abstract. Consistent with *Baker v. Carr*, the *Rostenkowski* court recognized that justiciability depends upon whether a rule is clear when applied to the specific facts of a particular case. *Id*. at 1310 (emphasis added).

The standards for resolving the criminal charges in this case are discernible and unambiguous. As already discussed above, the use of state resources and employees for campaign activities is expressly prohibited by the statutes, and the Assembly Handbook, e-mails and memos. Notwithstanding these explicit prohibitions, petitioners assert that there are "no statutes, rules or regulations that define or differentiate political or campaign-related activity." Petitioners ignore the obvious sources cited above.

In their brief, petitioners state "The obvious question that immediately arises is how can a legislator be prevented from engaging in political activity while functioning in a legislative capacity?" (Petitioners' brief at 32-33). This question ignores the repeated warnings provided by the Assembly itself to its members and employees that political activity using state resources is strictly prohibited.

There is nothing ambiguous about the term "political activity." That phrase is used interchangeably with "political purposes" and "campaign activity" in the Assembly documents. "Political purposes" is a term of art

that has been long equated with campaign activity by the legislature and the courts.

For example, the phrase "political purposes" is used extensively in chapter 11. Significantly, that chapter is entitled "Campaign Financing." The campaign finance restrictions therein apply primarily to acts done "for political purposes," which are specifically defined as acts done "for the purpose of influencing the election or nomination for election of any individual to state or local office." Wis. Stat. § 11.01(16).[7] The other express provisions from chapters 11, 12 and 19 discussed above further provide "judicially discoverable and manageable standards."

Lest there be any doubt about the type of political activity the Assembly memos make it clear: state equipment, supplies, and employees are strictly for conducting official state business and are not to be used at all for *campaign* activities (32:Ex.9 at 2; R-Ap.).

The term "political activity" is readily discernible when applied to the facts of the criminal complaint. Petitioners would be hard-pressed to deny that running private election campaigns, and hiring and supervising someone to do that, constitutes political activity. Supervising state employees to work for Taxpayers for Jensen is, by any definition of the term, "political activity." Fundraising for partisan election campaigns, which Schultz did under the supervision of Jensen and Foti, and recruiting and directly assisting political

[7]Predecessor statutes to chapter 11 also defined for the phrase "for political purposes" in a similar manner. *See, e.g., State ex rel. LaFollette v. Kohler,* 200 Wis. 518, 228 N.W. 895 (1930) (interpreting then existing § 12.01).

candidates, which Carey and Kratochwill did under Jensen's supervision, are unambiguous political activities.

Here, the Assembly's rules and the statutes enacted by the legislature are sufficiently clear "that [this court] can be confident of [its] interpretation" of them. *Rostenkowski*, 59 F.3d at 1306. Under this authority, the operation of private political campaigns using state funds and resources was strictly prohibited. In the present case, a judicially discoverable and manageable standard exists. As set forth above, the Assembly's own rules expressly forbid legislative employees from "political activity" using state time or resources.

For these same reasons, *People v. Ohrenstein*, 549 N.Y.S.2d 962 (App. Div. 1989), relied upon by petitioners, is also distinguishable. In that case, the court determined that "there were no legislative standards, rules or guidelines in existence detailing the 'proper duties' of legislative employees." *Id*. at 975.

Cannon, 642 F.2d 1373, and *Winpisinger v. Watson,* 628 F.2d 133 (D.C. Cir. 1980), both cited by petitioners, may be distinguished on similar grounds. The *Cannon* court held there was "a complete absence" of judicially discoverable and manageable standards for resolving the question whether Senators may use paid staff members in their campaign activities. *Id.* at 1379. The court stated: "Not even the Senate itself has been able to reach a consensus on the propriety of using staff members in reelection campaigns." *Id*. at 1380. Furthermore, no other statute, administrative law or judicial decision guided the court in determination of the issue generated by the charges. *Id*. at 1379.

Likewise, as recognized in the *Rostenkowski* court, in *Winpisinger,* the court had no standard at all by which to decide whether the defendants' conduct was "official." *Rostenkowski,* 59 F.3d at 1309.

In contrast, the Wisconsin Legislature has clearly established that state employees and state resources cannot be used to conduct campaign activities. Given this clear policy statement by the legislature, petitioners' claim that there are no statutes, rules or regulations that define or differentiate political or campaign-related activity is unsupportable.

In view of the foregoing, petitioners have failed to demonstrate a textually demonstrable constitutional commitment of this issue to the legislature or a lack of judicially discoverable and manageable standard for resolving the issue. *Carr*, 369 U.S. at 217. Consequently, this case is justiciable and petitioners' separation of powers claim fails.

CONCLUSION

> Left unsaid thus far are certain propositions so deeply embedded in our jurisprudence that they rarely find expression. Perhaps those values which go to the very heart of our democratic system of government need restating. The first is that no man is beyond the reach of the law. And the second is that those privileged to make the laws are obliged to obey them and live within their prescriptions.

State v. Gregorio, 451 A.2d 980, 988 (N.J. Super. 1982). Petitioners were properly charged under well-established law, and their prosecutions should go forward. Therefore, the state respectfully requests that this court affirm the

court of appeals' decision and the circuit court's order denying petitioners' motions to dismiss.

Dated this 16th day of September, 2004.

Respectfully submitted,

PEGGY A. LAUTENSCHLAGER
Attorney General

BARBARA L. OSWALD
Assistant Attorney General
State Bar No. 1021541

Attorneys for Plaintiff-Respondent

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 266-3067

CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 14,858 words.

_____
BARBARA L. OSWALD
Assistant Attorney General